

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 1362 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

ORIENTAL BANK OF COMMERCE - Petitioner(s)

Versus

NARESH KHUSHALDAS GANGTANI - Respondent(s)

Appearance :

MR KM PARIKH for Petitioner(s) : 1,

MR MEHUL S SHAH for Respondent(s) : 1,

MR SURESH M SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 15/06/2007

ORAL JUDGMENT

1. The petitioner – original defendant i.e. Oriental Bank of Commerce has filed this petition under Articles-226 and 227 of the Constitution of India, praying for quashing and setting aside the order dated 4.1.2005 passed by the learned 5th Jt. Civil Judge (S.D.) at Jamnagar, dismissing the preliminary objection / application below Ex.12 filed by the petitioner Bank – original defendant in Regular Civil Suit No.647 of 2004. The petitioner Bank has also prayed for declaration that the learned 5th Jt. Civil Judge (S.D.) at Jamnagar has no power, authority and/or jurisdiction to try, entertain and dispose of the Civil Suit of the nature filed by the present respondent –

original plaintiff.

2. This Court has issued notice on 4.2.2005 and by way of interim relief this Court has restrained the trial Court from deciding the matter till this petition is heard by this Court. This Court has thereafter issued rule on 22.3.2005 and interim relief granted by this Court earlier was ordered to be continued.

3. It is the case of the petitioner – Bank that the petitioner – Bank is the original defendant, against whom the respondent has filed the suit being Regular Civil Suit No.647 of 2004 in the Court of learned 5th Jt. Civil Judge (S.D.) at Jamnagar, which is pending for hearing and final disposal in the said Court.

4. The petitioner – Bank, original defendant has granted and sanctioned credit facilities to

the tune of Rs.4.90 lacs by way of Term Loan as well as Rs.2.50 lacs by way of Cash Credit (against hypothecation) carrying interest at the rate of 15.24% per annum with monthly interest, to one Shri Khushaldas Bhagwandas Gangtani (hereinafter referred to as 'the borrower') sole proprietor of M/s.Laxmi Beverages carrying on his business activities at No.44 GIDC, Phase-II Dared, Jamnagar. The petitioner Bank granted the various credit facilities to the said borrower, the father of the respondent, on various terms and conditions contained in letter of sanction issued by the petitioner Bank – original defendant to the said borrower. It was one of the stipulations of the sanctioned terms of the said advances that the said borrower was required to create equitable mortgage/charge over the immovable property belonging to the said borrower being lying and situated at Plot No.60 Digvijay Plot on the Land of Survey No.433/H/4 paiki part “B”

paiki on the ground floor having New Sheet No.379 of Survey No.2858 admeasuring approximately 690 Sq.feet belonging to the said borrower. Under the guise of being a tenant of the suit property, the respondent has filed Regular Civil Suit No.647 of 2004 in the Court of learned Civil Judge (S.D.) at Jamnagar and the petitioner Bank filed preliminary objection / application below Ex.12 in the said suit, which came to be dismissed by an order dated 4.1.2005 passed by the learned 5th Jt. Civil Judge (S.D.) at Jamnagar, which is under challenge in the present petition.

5. Mr.K.M.Parikh, learned advocate appearing for the petitioner Bank has submitted that the borrower has executed an agreement on 15.2.2000 and deposited the original title deed in respect of immovable property and thereby created first and exclusive equitable mortgage/charge in favour of the petitioner

Bank so as to secure repayment of various credit facilities granted by the petitioner Bank to the borrower. He has further submitted that the said borrower was not paying regular installment and interest to the petitioner Bank and, therefore, the petitioner was constrained to issue various notices to the borrower and he was called upon to regularize the two accounts to the satisfaction of the petitioner Bank. Despite this fact, the borrower failed and neglected to do so and had also failed and neglected to regularize the two accounts with the petitioner Bank. The petitioner Bank was therefore left with no other alternative except to initiate the appropriate proceedings available under the provisions of law. The petitioner Bank thereafter issued the legal notice under the provisions of Section-13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(hereinafter referred to as 'the Act') and called upon the borrower as well as the guarantor to repay the outstanding dues in both the accounts to the petitioner Bank within a period of 60 days from the date of receipt of the said notice issued under the provisions of the Act. The petitioner Bank thereafter issued a public notice in local daily in Gujarati edition, namely, 'Naubat' dated 1.5.2004 and informed the public at large that the property in question belonging to the borrower has already been mortgaged by him in favour of the petitioner Bank and, therefore, informed the public at large not to deal with the transfer, alienate and entertain any transaction with the said borrower in respect of immovable property in question. The petitioner Bank had also issued public notice in local daily in Gujarati 'Aaj Kaal' in its edition dated 1.5.2004 and informed the public at large about the same thing.

6. Mr.Parikh has further submitted that all these facts were well within the knowledge of the said borrower as well as the present respondent – original plaintiff. Inspite of having knowledge of the above mentioned facts on record, the present respondent has filed a suit being Regular Civil Suit No.647 of 2004 for declaration and permanent injunction against the present petitioner Bank and prayed for various relief in the said suit. An injunction order against the present petitioner Bank was passed. The petitioner, therefore, moved an application Ex.12 on 4.1.2005 raising preliminary issue for rejection of plaint. The learned Jt. Civil Judge has rejected the said application vide his order under challenge.

7. Mr.Parikh has further submitted that even after the expiry of the period of 60 days

from the date of receipt of the notice under Section-13(2) of the Act the borrower has not requested for settlement nor made any payment towards the outstanding dues as mentioned in the said notices. The petitioner Bank therefore, invoked the provisions of Section-13(4) of the Act and issued a possession notice dated 21.9.2004 to the borrower and also called upon him and gave caution not to deal with the said property and also restrained him from dealing with the said property in any manner whatsoever. He has further submitted that the said possession notice was also affixed on conspicuous and prime location of the mortgaged property of the borrower in presence of two panchas and panchnama was also made in respect of the said property on 21.9.2004 and accordingly symbolic possession of the said immovable property was taken by the petitioner Bank.

8. Mr.Parikh has further submitted that the

order passed by the learned Civil Judge is absolutely bad in law, illegal and contrary to law, facts and evidence on record and, therefore, the same deserves to be quashed and set aside. He has further submitted that the learned Jt. Civil Judge has no jurisdiction to try and entertain the suit of the nature filed by the respondent. He has further submitted that it is an admitted fact that in respect of the said property, the father of the present respondent – original plaintiff had already created first, foremost and exclusive equitable mortgage/charge in favour of the petitioner Bank, as far back on 15.2.2000 by way of deposit of original title deeds and thus, admittedly, the petitioner Bank is having its first and exclusive charge as a mortgage of the said immovable property belonging to the borrower and hence no relief can ever be granted by the learned Jt. Civil Judge against the enforcement of the security interest created by the borrower in favour of

the petitioner Bank to recover the public money in accordance with the provisions of law.

9. Mr.Parikh has further submitted that as provided under the provisions of Section-34 of the Act no Civil Court shall have any jurisdiction to try and entertain any suit and/or proceedings in respect of any matter of whatsoever nature for which the DRT or the Appellate Tribunal is empowered by or under the said Act to determine and no injunction shall ever be granted by any Court and/or authority in respect of any action taken or to be taken in pursuance to the powers conferred by or under the said Act. He has further submitted that exercise of powers by the petitioner Bank – original defendant is under the provisions of Section-13(2) of the Act and accordingly as per Section-34 of the Act, Civil Court much less the learned 5th Jt. Civil Judge (S.D.) at Jamnagar has no

jurisdiction, power and/or authority to try, entertain and deal with the said suit and he has no authority jurisdiction or power to grant any injunction against the petitioner Bank.

10. Mr.Parikh has further submitted that the learned Jt. Civil Judge has not properly appreciated the provisions of the Act as the said provision shall have overriding effect with regard to the subject matter of the suit being Regular Civil Suit No.647 of 2004 as well as preliminary objection / application below Ex.12 preferred by the petitioner Bank in the said suit. It is an admitted position that the suit property came to be allegedly rented out / let out by the borrower after creation of charge of equitable mortgage by him in favour of his son and hence charge of the petitioner Bank would prevails over the so called tenancy right of the present respondent and hence in any case the present

respondent had no legal and/or better right, title and/or interest over the petitioner Bank, so long as the petitioner Bank realises its entire outstanding dues from the borrower either by attachment/sale/disposal of the said mortgaged immovable property belonging to the borrower under the provision of law. He has, therefore, submitted that the present respondent had no better right, title or interest as tenant over the admitted right, title or interest of the petitioner Bank as a mortgagee. He has, therefore, submitted that the Regular Civil Suit No.647 of 2004 preferred by the respondent deserves to be dismissed with cost and consequently the application below Ex.12 filed by the petitioner Bank is required to be allowed in toto.

11.Mr.Parikh has further submitted that the petitioner – Bank has already taken the symbolic possession of the said mortgaged

immovable property as far back on 21.9.2004 and on the said ground also no injunction against the petitioner – Bank can ever be granted under the provision of Code of Civil Procedure. Mr.Parikh has, therefore, submitted that the petition deserves to be allowed in toto with costs.

12. Mr.S.M.Shah, learned advocate appearing for the respondent, on the other hand has seriously objected to granting of any relief in this petition. He has submitted that though the petition is filed under Articles-226 and 227 of the Constitution of India, it is neither maintainable under Article-226 nor 227 of the Constitution of India. If the petition is treated under Article-226, the petitioner – Bank has not joined the adjudicating authority i.e. Jt. Civil Judge (S.D.), Jamnagar as party respondent and hence no writ can ever be issued against him. If the petition is treated under Article-227

of the Constitution of India the petitioner has annexed certain documents which are not forming part of the record of the Civil Suit, which is filed by the respondent and hence those documents cannot be looked into by this Court while exercising its powers under Article-227 of the Constitution of India. He has further submitted that the application Ex.12 preferred by the petitioner – Bank for rejection of the plaint has rightly been rejected by the learned Jt. Civil Judge as it is nowhere mentioned as to under which provision it is filed. For the purpose of rejection of the plaint one has to see the provision contained under Order-7 Rule-11 of the Civil Procedure Code. If it is the case of the petitioner that the application is filed under Order-7 Rule-11(d) on the ground that the suit is not maintainable by virtue of the provision of Securitization Act, in that case one has to see the plaint itself and there is nothing in the plaint which

suggest that the suit is barred. He has further submitted that the Court has not to see beyond the plaint and hence all these documents which are made with regard to creation of charge, publication of advertisement, affixation of summons etc, are not relevant for the purpose of deciding the present petition filed for quashing and setting aside of order passed below Ex.12. Mr.Shah has further submitted that it is settled position that before filing written statement, no preliminary objections can be raised nor it can be entertained by the Court. Here the present petitioner has not filed written statement before the trial Court and straightway moved an application Ex.12. He has therefore submitted that the said application has rightly been rejected by the learned Jt. Civil Judge.

13. In support of his submission he cited various authorities.

14. Mr. Shah has relied on the decision of the **Privy Council Vs. National Bank of India Ltd., reported in 1918 Indian Law Reports Vol.XL 598**, wherein it is held that “the question raised by this appeal is therefore a pure point of law. Both the District Judge and the Chief Court have clearly stated that the decisions which they have given are based on the allegations in the plaint, and that for the purposes of such decisions these allegations must be taken to be true in fact. This is a necessary consequence of the nature of the plea, and the same understanding must apply to the present judgment. In asking the Court to decide an issue like the present (which is essentially a demurrer, by whatever name it may be called) the defendants must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true modo et forma. In so doing they reserve to

themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint must be taken to be true as stated". The Privy Council further held that, "that being so, it is only necessary to look at the plaint to see that according to English law the contention of the defendants is unsustainable".

15. Mr.Shah further relied on the decision of Nagpur High Court in the case of **Fatehchand Ganeshram Agarwal Vs. Wasudeo Shrawan Dalal**, reported in AIR (35) 1948 Nagur 334, wherein it is held that where the defendants ask the Court to decide an issue, such as a preliminary point as to limitation, on the very allegations of the plaintiff, they must be taken to admit for the sake of argument

that the allegations of the plaintiff in his plaint are true reserving to themselves the right to show that these allegations are wholly or partially false in the further stage of the action, should the preliminary point be overruled. Hence for the purpose of deciding such point the statement of the defendants has to be ignored.

16. Mr.Shah has further relied on the decision of Allahbad High Court in the case of **Smt. Indra Vs. Raj Bali Tiwari, reported in AIR 1966 Allahbad 559**, wherein it is held that jurisdiction of a Court or maintainability of a suit is determined on the allegation made in the plaint as has been held in *Ananti vs. Chhannu*, 1930 All LJ 256: (AIR 1930 All 193) (FB) and *D.N.Rege Vs. Muhammad Haider*, AIR 1946 All 379 (FB). Allegations or assertions made in the written statement cannot oust the jurisdiction or affect the maintainability of the suit. If after going into the merits of

the case of the plaintiff it is found to be false and the defence contention is upheld then in that case the suit has to be dismissed as held in 1930 All LJ 256: (AIR 1930 All 193) (FB).

17. Mr. Shah has further relied on the decision of Hon'ble Supreme Court in the case of **Abdul Waheed Khan Vs. Bhawani and others**, reported in **AIR 1966 SC 1718**, wherein it is held that under Section-9 of the Code of Civil Procedure, a civil Court can entertain a suit of a civil nature except a suit of which its cognizance is either expressly or impliedly barred. It is settled principle that it is for the party who seeks to oust the jurisdiction of a civil Court to establish his contention. It is also equally well settled that a statute ousting the jurisdiction of a civil Court must be strictly construed.

18. Mr.Shah in support of his submission that the jurisdiction of the High Court under Article-227 of the Constitution is a supervisory jurisdiction and its scope is very limited, has relied on the decision of the Hon'ble Supreme Court in the case of **Mohd. Yunus vs. Mohd. Mustaqim and others, reported in AIR 1984 SC 38**, wherein it is held that a mere wrong decision without any thing more is not enough to attract the jurisdiction of the High Court under Art.227. The supervisory jurisdiction conferred on the High Courts under Art.227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority" and not to correct an error apparent on the face of the record, much less an error of law. In exercising the supervisory power under Art.227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the

inferior court or tribunal purports to be based or to correct errors of law in the decision.

19. Mr. Shah, in support of his submission that while considering an application raising preliminary issue filed under Order-14 Rule-2 of the C.P.C., the Court normally decides all the issues together, has relied on the decision of Narendra Ray vs. Kunjabehari Ray and another, reported in AIR 1992 Orissa 217. While deciding an application under Order-14 Rule-2 of the C.P.C. the first question for determination by the trial Court is whether an acceptable case has been made out for taking up the issue in question as a preliminary issue. The Court has to bear in mind that the general rule is to take up all the issues together and piecemeal trial of the issue is to be avoided. It is only in certain exceptional circumstances as provided under O.14 R.2 C.P.C., that the Court should

accede to the prayer for taking up one or more of the issues as preliminary issues. If the trial Court decides to allow the prayer of the applicant to take up the issue in question as preliminary issue, then the parties should be called upon to produce evidence in support of their respective cases relating to that issue and on consideration of the materials, if any, produced by the parties, the Court should decide the issue and the suit.

20. Mr.Shah has further relied on the decision of the **Rajasthan High Court in the case of M/s.Lakhara and Co. Vs. Shivakaran Bhanwar Lal Kila, reported in AIR 1995 Rajasthan 17,** wherein it is held that the question regarding jurisdiction is a mixed question of fact and law and that can only be decided after the parties have adduced their evidence.

21. Mr.Shah has also relied on the decision of this Court in the case of **Kaushiklal Nanalal Parikh Vs. Mafatlal Industries Ltd. & Ors, reported in 1995(1) GLR 557**, wherein the Court has held that it is settled principle of law that all the issues be decided together. In this connection, the Court has made the reference of a decision of this Court in the case of Saurashtra Cement & Chemical Industries Ltd., Vs. Esma Industries reported in 1989 (2) GLR 1263 and quoted a passage therefrom which is as under:-

"After the amendment in this provision in 1976, it becomes clear that the legislature has frowned upon trial of suits piece-meal. The reason is obvious. If on a preliminary issue, the suit is tried and if the issue is decided one way or the other, it would lead to further proceedings by way, of appeal or revision. Number of years would lapse and ultimately when the highest Court which is approached in heirarchy decides the matter

one way or the other a stage may be reached where the suit has to be tried further and that would involve lot of delay and the parties would be tried further and that would involve lot of delay and the parties would get completely exhausted and exasperated by passage of time underlying such piece-meal trial of suits. With a view to avoiding such delay and exasperation to the litigating public, this provision of Order 14, Rule 2 in the amended form has been brought in the statute book. Consequently, underlying principle of this provision is laudable and beneficial one. As per this provision, it is indicated by the legislature that suit must be tried as a whole in all issues."

22. Mr.Shah further relied on the decision of the Madras High Court in the case of **Major Ramchandran & Anr, Vs. Mrs.Rema Jayarajan, reported in III (1999) CLT 96 (DB)**, wherein it is held that a preliminary issue had to be

decided on the basis of the pleadings, documents and oral evidence, as it is mixed question of law and facts along with other issues as well.

23. Mr.Shah in support of his submission that without filing written statement the defendant cannot raise an objection to jurisdiction and raise a preliminary issue to that effect, has relied on the decision of the Bombay High Court in the case of **B.S.I.Ltd., Vs. "CRISTIAN-C" and others, reported in AIR 1999 Bombay 320**, When the stage of filing written statement has been reached, then the only option available to the defendants is to file their written statement raising therein their objection regarding jurisdiction. There is no other stage which gives a right to defendants to take out notice of motion taking objection to jurisdiction. If and when the defendants files written statement and raise an

objection to jurisdiction then the issue will have to be framed on that point. The defendants will have to convince the Court that the said issue has to be decided as a preliminary issue and if that is done by the Court, then only the objection to jurisdiction can be decided. There is no intermediary stage for raising an objection to jurisdiction excepting filing of written statement and taking that plea or unless the matter is covered by S. 9A of the CPC. Further the stage of first hearing of the suit is after filing of the written statement and before framing of the issues. Consequently, O. 15, R. 1 has no application in present case as a result the only stage of raising objection to jurisdiction, if the matter does not come under S. 9A of the CPC, is by filing written statement and raising the objection therein.

24. Mr.Shah has further relied on the decision

of the Hon'ble Supreme Court in the case of **Dhruv Green Field Ltd. Vs. Hukum Singh & Ors., reported in 2002(8) SRJ 126 Supreme Court of India**, wherein it is held that it is a well-settled that the averments and relief claimed in the plaint determine the jurisdiction of the Court.

25. Mr. Shah has relied on the decision of this Court in the case of **Bharat Heavy Electricals Ltd., Vs. General Contractor Company, reported in 1996(1) GLR Vol.XXXVII**, wherein it is held that It is very clear from the impugned order that instead of deciding the aforesaid request for raising an issue relating to jurisdiction, the learned trial Judge disposed of the said issue as if it was raised. The trial Court was required and requested to frame an issue relating to jurisdiction only. It was not proper and not open to the trial Court to decide the merits of the issue as if it was raised. Thus, the

trial Court has committed a serious error in law requiring interference of this Court. Ordinarily, in such a situation, the trial Court should be directed to decide all issues simultaneously so as to obviate delay in deciding the case. However, in view of the peculiar facts and circumstances emerging from the record of the present case, it would be expedient to direct the trial Court to consider whether the proposed issue relating to jurisdiction can be taken up as a preliminary issue. If the trial Court finds that such an issue can be taken up as a preliminary issue in light of settled proposition of law, then in that case, it will have to decide the merits of that issue by raising it as a preliminary issue. On the other hand, if the trial Court finds that such an issue is not a pure issue of law or in other words, it is a mixed question of law and fact, then, the Court would hold that such an issue cannot be raised as a

preliminary issue being not a pure question of law.

26. On the basis of the aforesaid decisions of the Court and looking to the facts of the present case, Mr. Shah has strongly urged that the present petition filed by the petitioner under Article-227 of the Constitution of India should not be entertained by this Court as it is filed against an order passed by the learned trial Judge rejecting an application Ex.12 wherein a preliminary issue regarding jurisdiction of trial Court was raised and the learned trial Judge has rightly rejected the said application on the ground that without filing the written statement such a preliminary issue cannot be decided and even otherwise, for the purpose of deciding this issue what is written in the plaint is to be taken into consideration. There is nothing in the plaint, which indicates that the trial Court has no jurisdiction to entertain the

suit. He has, therefore, submitted that the petition be dismissed with costs.

27. To meet with the submissions of Mr. Shah and the authorities relied upon by him, Mr. Parikh has strongly urged before the Court that without filing written statement the question of jurisdiction can be raised. He has submitted that whenever any question as to whether jurisdiction of the either territorial or pecuniary is raised at any stage of the suit, it is the bounden duty of the Court to decide the matter to short circuit litigation and protect parties from undue harassment of protracted and expensive litigation. In the present case it is not a case of territorial or pecuniary jurisdiction of the Court, but it is a case relating to inherent lack of jurisdiction of the Court. He has invited Court's attention to the decision of the Hon'ble Supreme Court in the case of **Kiran Singh v. Chaman Paswan, AIR**

1954 SC 340, wherein it is held that "It is a fundamental principle that a decree passed by the Court, without jurisdiction is a nullity and that its invalidity could be set up whenever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. It was further held that a defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strike at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. He has, therefore, submitted that if the matter relates to the jurisdiction - territorial or pecuniary or inherent lack of jurisdiction, it strikes at the very authority of the Court to pass any decree. Hence, he has submitted that such an issue can be raised at any stage of the suit. He has submitted that the defect of jurisdiction strikes at the very authority of

the Court to pass any decree, and it can, therefore, be challenged at any stage of the suit. It will serve no purpose if in a case where there is apparent lack of inherent jurisdiction the parties are forced to file written statement and then a preliminary issue is framed and thereafter it is held that the Court had no inherent jurisdiction to try the case. The plaint can be returned at any stage of the suit for presentation to proper Court to which it ought to have been instituted as provided under 0.7, R.10, CPC. The words 'at any stage of the suit', are important. These words also include the stage prior to the filing of the written statement. Thus the question of jurisdiction or lack of inherent jurisdiction can be seen at any stage as it strikes at the very authority of the Court to pass a decree. For this purpose he relied on the decision of Madhya Pradesh High Court in the case of **Intazamiya Committee Id Gah. Morar, vs. M.P. Wakf Board,**

Bhopal, reported in AIR 1996 MadhyaPradesh 47, which takes this view with which this Court fully agrees.

28. Mr.Parikh further submits that once the Civil Court has no jurisdiction to entertain the suit the plaint of the suit has to be straightway rejected instead of sending it to any other Court. In support of his submission he relied on the decision in the case of **Ajmer Kaur and others Vs. Punjab State and others, reported in AIR 1991 Punjab and Haryana 12,** wherein it is held that the perusal of the provisions contained in Northern India Canal and Drainage Act, 1873, would show that the jurisdiction of the civil Court was barred and hence the plaint was required to be rejected under Order-7 Rule-11(d) of C.P.C. instead of returning the same. The palint can be returned under Order-7 Rule-10 of C.P.C. for the purpose of presentation of the same to the Court in

which the suit should have been instituted. Since the suit could not be instituted in any Civil Court whether A,B or C the plaint was required to be rejected being barred by Northern India Canal and Drainage Act, 1873.

29. Mr.Parikh further relied on the decision in the case of **Tej Kiran Jain and others Vs. N. Sanjiva Reddy and others, reported in AIR 1971 Delhi 86 Full Bench**, wherein it is held that a plaint in suit for damages on the allegation that the defendants who were members of Lok Sabha had made certain defamatory statements about the plaintiff's Guru in the Parliament while it was in session, is liable to be rejected under Order-7, Rule-11(d) as the suit is barred by the provisions of Art.105(2) of the Constitution. While delivering this judgment the Delhi High Court has referred to and relied upon the judgment of the Hon'ble Supreme Court in the matter of Special

Reference No.1 of 1964 made to the Hon'ble Supreme Court under Art.143 of the Constitution of India, reported in AIR 1965 SC 745, wherein it is held that Clause (1) of Article-105 confers freedom of speech on the legislators within the legislative chamber and Clause (2) makes it plain that the freedom is literally absolute and unfettered. The protection given by the above clause is to anything said in Parliament. The words 'anything said' are widest amplitude and it is not permissible to read any limitation therein. The object of the provision obviously was to secure absolute freedom in discussion in Parliament and to allay any apprehension of a legal proceeding in a court of law in respect of anything said in Parliament by a member thereof.

30. In support of his submission that the Civil Court has no jurisdiction to entertain the suit, Mr.Shah has relied on the decision

of the Hon'ble Supreme Court in the case of **Transcore Vs. Union of India & Anr, reported in I(2007) BC 33 (SC) AIR 2007 SC 1249**, wherein the Hon'ble Supreme Court has taken the view that SRFAESI Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section-12 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other

obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/FI; needs to be enforced expeditiously without the intervention of the Court/Tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For this reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said act removes all fetters under the above circumstances on the rights of the secured creditor. The Court has also dealt with the issue regarding possession of secured assets of borrower under Section-13(4) of the NPA Act, which comprehends the power to take actual possession of the immovable property. While reversing the High Court judgment, the

Court held that the High Court was not right in holding that the borrower or any other person in possession of immovable property cannot be physically dispossessed at the time of issuance of notice under Section-13(4) of the Act, so as to defeat adjudication of his claim by the DRT under Section-17 of the Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule-9(9) of the 2002 Rules. The Court further held that drawing of dichotomy between symbolic and actual possession does not find place in scheme of the Act. The authorised officer under Rule 8 has greater powers than even Court Receiver as security interest in the property is already created in favour of the banks/FIs. The Court has also taken note of the fact that third party interest are created overnight and in many cases third parties take up the defence of being a bona fide purchaser for value without notice. These types of disputes sought to be

avoided by Rule-8 read with Rule-9 of the 2002 Rules. The Court, therefore, took the view that Section 13(2), 13(4), 13(4A), 14, 17(1), 17(3) of the Act as well as Rules 8, 8(4), 9(6), 9(9) of Security Interest (Enforcement) Rules, 2002 completely vest the jurisdiction in the DRT and by virtue of Sections 34 and 35 of the Act no other forum is having any jurisdiction to entertain such suit. In view of these propositions of law and in view of the fact that the property in question belongs to the borrower, who has failed to discharge his obligation and interest was created by the Bank in the said property, Civil Court has no jurisdiction to entertain the suit filed by the present respondent – original plaintiff.

31. After having heard the learned advocates for the respective parties and after having gone through the memo of petition and after having considered the submissions made by

Mr.Shah as well as authorities cited by him in support of his submissions and the authorities cited by Mr.Parikh, the Court is of the view that the learned trial Judge is not right in rejecting the application Ex.12 filed by the present petitioner raising preliminary issue to the effect that the trial Court has no jurisdiction to entertain the said suit. The facts which are emerging from the present petition clearly establishes that the respondent's father has availed of the credit facilities from the petitioner Bank and he failed to repay the said debt. While taking the credit facilities from the petitioner Bank the father of the respondent – plaintiff has created an equitable mortgage in favour of the Bank by depositing the original title deeds with the petitioner Bank. The petitioner Bank has issued notice under Section 13(2) of the Act on 7.11.2003, which was sought to be replied by the plaintiff's father. Notice through public

advertisement was issued on 1.5.2004. The petitioner Bank thereafter took the symbolic possession on 21.9.2004 and panchnama was also drawn to this effect on the same date. Thereafter, public advertisement was issued under Rule 8(1) on 23.12.2004 informing the public at large that the authorised officer has taken the possession of the property in exercise of power conferred under Section 13(4) of the Act read with Rule-9 of the Rules. It is only after undertaking this exercise by the petitioner Bank the respondent – plaintiff has filed the suit on 24.12.2004 before the learned Civil Judge (S.D.) Jamnagar praying for injunction against the petitioner – Bank.

32.Despite this fact, the respondent – plaintiff who is son of the borrower and in whose property he has shown himself as the tenant, has not disclosed anything about the issuance of notice under Section 13(2),

publication of notice in the newspaper, panchnama, possession notice etc, and by concealing all these facts he has obtained an exparte injunction from the Court. On service of the notice on the petitioner Bank, an application Ex.12 was filed raising preliminary objections in respect of jurisdiction of the Civil Court and filing of Civil Suit by the respondent – plaintiff. It was made clear by the petitioner Bank in the said application that it has already invoked the provision of the Act and has already taken over the symbolic possession of the property in question. The Bank has also brought to the notice of the trial Court the relevant provisions contained under Sections 34 and 35 of the Act. It was made clear in the application that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT is empowered by or under this Act to determine and no injunction shall be granted

by a Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The petitioner Bank has also made reference of Section-35 of the Act and submitted that the provisions of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. The petitioner Bank has, therefore, urged before the learned trial Judge that in view of this clear provision of law the Civil Court has no jurisdiction to entertain, deal with or dispose of any suit or proceeding in respect of any matter or in respect of action or measure taken or to be taken by the Bank/FIs or by the secured creditor for the enforcement of security, interest, credit in the secured assets. The petitioner Bank has

also submitted in the said application that Chapter-III of the Act provides enforcement of security interest. Section-13 provides enforcement of security interest and Section 17 provides remedy to the aggrieved person by virtue of initiation of action under Section 13(4) of the Act. It is, therefore, urged that the effective, alternative, speedy and statutory remedy of an appeal as provided under Section 17 of the Act is available to the respondent – plaintiff.

33. Despite this clear statutory provision duly supported by the judgment of the Hon'ble Supreme Court, the suit was entertained and injunction was granted. When there is inherent lack of jurisdiction, the petitioner Bank can certainly raise the preliminary objection without filing written statement. Such application cannot be thrown overboard on the ground that for the purpose of dismissal of the suit or rejection of the

plaint only the facts stated or the statement made in the plaint are to be taken into consideration. An unscrupulous litigant may not disclose all the relevant facts truly and correctly. When these facts are brought to the notice of the Court, though in the form of preliminary objections, the Court cannot overrule the same. It is settled principle of law that the question regarding lack of inherent jurisdiction can be gone into at any stage of the proceeding and it is not necessary that only after filing of the written statement such issue can be raised.

34. Taking any view of the matter, this Court is of the view that the learned Civil Judge has no jurisdiction to entertain the suit and to grant any relief in the matter. The impugned order passed by the learned Civil Judge rejecting the application Ex.12 raising preliminary issue regarding jurisdiction is hereby quashed and set aside. The learned 5th

Joint Civil Judge (S.D.), Jamnagar has no jurisdiction to entertain the Regular Civil Suit No.647 of 2004 and to pass any interim order therein. The plaint in the said suit deserves to be rejected and it is accordingly rejected. The petition is accordingly allowed. Rule is made absolute with no order as to cost.

(K. A. PUJ, J.)

kks